



September 16, 2005

Honorable Members of the Washington State Senate  
Honorable Members of the Washington State House of Representatives  
Olympia, WA 98504

Dear Member of the Washington State Legislature,

This letter responds to a recent letter to all Legislators from the Evergreen Freedom Foundation. That letter raised questions regarding the validity and propriety of rules promulgated by our office to implement election reform legislation.

Our office does not agree with the Evergreen Freedom Foundation claims. The rules filed with the Office of the Code Reviser for the 2005 elections are consistent with both the letter and spirit of the election reform legislation passed by the 2005 Legislature.

The 2005 Legislature passed eleven election reform bills in the aftermath of the 2004 Governor's race.

Since passage of this legislation, the Elections Division of the Secretary of State's Office and election administrators in Washington's thirty-nine counties have been working to implement these reforms.

On August 19, 2005, the Elections Division filed with the Code Reviser a comprehensive set of rules to implement these new laws. A total of 135 rules were amended, repealed or enacted. These rules are currently in effect for the 2005 elections.

Assistant Elections Director Katie Blinn led the effort in our office to prepare and file these rules in a timely and comprehensive fashion. As you know, Katie Blinn was also actively engaged in development of the election reform legislation with the policy committees in both houses of the Legislature.

Also throughout the summer, the Elections Division and the County Auditors have been engaged in various training sessions on the new statutes and rules to prepare for the 2005 elections.

As you may be receiving inquiries from constituents about these issues, we are attaching for you a comprehensive point by point response to the issues raised by the Evergreen Freedom Foundation.

A short discussion of key issues is summarized below.

**Double Voting.** EFF claims that rules have not been put in place to prevent double voting by provisional voters. This is not the case. State rules are in effect to prevent double voting. These rules are being implemented by all counties. If a voter attempts to cast both an absentee ballot and a provisional ballot, the first ballot received will be counted according to the provisions of state law, and the voter will be credited with voting. The second ballot received will not be counted. Further, county officials may refer such situations to law enforcement authorities for criminal action.

**Ballot Referrals to Canvassing Boards.** EFF claims that rules are in place that provide for improper referral of ballots with questionable voter intent to County Canvassing Boards. This is not the case. State statutes and rules clearly provide that ballots evidencing questionable voter intent must be referred to the Canvassing Board and that only the Canvassing Board has authority to reject a ballot where voter intent is not clear.

**Signature Verification Processes.** EFF claims that the state has not enacted proper rules for signature verification and training. This is not the case. In close cooperation with signature experts at the Washington State Patrol, the state has promulgated clear signature verification standards, and further has worked with the State Patrol and the counties to ensure proper training of election workers in the signature verification processes.

**HAVA Standards.** EFF claims that the state has not enacted standards defining what is a vote as required by the Help America Vote Act (HAVA). This is not the case. Both by statute and regulation, Washington has adopted standards defining "what is a vote" and these standards are being implemented by Washington counties.

**Provisional Ballots.** EFF claims that the state has not enacted proper standards for issuing provisional ballots. This is not the case. The State Legislature declared standards in the 2005 legislation for issuing provisional ballots consistent with the Help America Vote Act.

A more detailed point by point response to the various claims of EFF is attached for your review.

If you have further questions regarding these issues, or any aspect of the election reform legislation, we would be happy to meet with you or your staff or to respond in any way.

I suggest that you direct any such inquiries to Elections Assistant Director Katie Blinn at [kblinn@secstate.wa.gov](mailto:kblinn@secstate.wa.gov) or (360) 902-4168.

Sincerely,



SAM REED  
Secretary of State

Evergreen Freedom Foundation	Office of the Secretary of State
<p><b><u>Replacement Absentee Ballots.</u></b>  The OSOS has written WAC 434-250-080 in such a way that replacement ballots and original absentee ballots can be counted at the same time in violation of the statute. It is doubtful that counting in parallel can provide the same level of security. Double voting may occur because of the delay between when envelopes are processed, crediting occurs, and crediting information is disseminated.</p>	<p>Replacement ballots and original absentee ballots cannot be counted at the same time. The first ballot in, whether the original absentee or the replacement absentee, is counted. The voter is credited with voting when the first ballot is received. Any ballot received after the first is not counted. "Counting in parallel" is not authorized. It is unclear what that refers to. There is no risk of double voting because the time period to process original ballots and replacement ballots is the same.</p>
<p><b><u>Provisional Ballots.</u></b>  WAC 434-240-250, now being repealed, had the safeguard of requiring provisional ballots to be retained until all absentee ballots are received and credited. Instead, WAC 434-253-047 allows simultaneous processing of absentee and provisional ballots, thus subverting the requirement of the statute and opening up the system for possible fraud.</p>	<p>WAC 434-253-047 explicitly prevents double voting: "If an absentee voter who voted a provisional ballot at the polls has already returned a voted absentee ballot, the provisional ballot is not counted. If the absentee voter who voted a provisional ballot at the polls has not returned a voted absentee ballot, the provisional ballot is counted. If a voted absentee ballot is returned after the provisional ballot has been counted, the absentee ballot is not counted."</p>
<p><b><u>Duplication.</u></b>  WAC 434-261-070 has a provision that a ballot must be referred to the canvassing board when it has been determined that the intent of the voter is not clear. The canvassing board can then override the perceptions of the ballot inspectors. This is in contradiction to the new legislation, which provides a strict limitation on duplication; a ballot may be duplicated only if the intent of the voter's marks on the ballot is clear.</p>	<p>The objection is to the practice of sending ballots in which voter intent is unclear to the County Canvassing Board. If voter intent is unclear, the ballot is to be rejected. Per RCW 29A.60.050, only the County Canvassing Board can reject ballots. There is not alternative but to refer such ballots to the County Canvassing Board. All final authority for interpreting ballots rests with the County Canvassing Board, not County Auditor line staff. RCW 29A.60.050 states, "Whenever the precinct election officers or the counting center personnel have a question about the validity of a ballot or the votes for an office or issue that they are unable to resolve, ... [t]hese ballots shall be delivered to the canvassing board for processing."</p>
<p><b><u>Notice to the Voter.</u></b>  Case law prohibits a ballot being "rejected" by a canvassing board without also notifying the voter. See <i>Joseph A. Bell, et al. v. Christopher M. Marinko, et al.</i> 235 F. Supp. 2d 772.</p>	<p>This is a misstatement of <i>Joseph A. Bell, et al. v. Christopher M. Marinko, et al.</i> 235 F. Supp. 2d 772. The cited case is from Ohio and addresses whether people who do not live in the jurisdiction may be registered to vote in the jurisdiction. The outcome of</p>



	the case was not in favor of the voters.
<p><b><u>Signature Verification.</u></b>  RCW 29A.04.530 levies the training guidelines and certification responsibility on the Secretary of State. WAC 434-250-120 states, “Personnel shall be instructed in the signature verification process prior to actually canvassing any signatures”. This is not sufficient.</p> <p>Only personnel trained according to the guidelines established by the Secretary of State, and tested and certified by the Secretary of State, may canvass signatures.</p>	<p>RCW 29A.04.530(2) requires the OSOS to establish guidelines for verifying signatures. The OSOS established such guidelines in WAC 434-379-020. RCW 29A.04.530(2) requires that all election personnel assigned to verify signatures receive training on the guidelines. The OSOS provided training to county elections administrators at a conference in May 2005 on signature verification techniques. This training was conducted by staff from the Washington State Patrol.</p> <p>County Auditors across the state are trained permanent and seasonal staff on the signature verification guidelines. Many County Auditors utilized the Washington State Patrol for that training.</p> <p>It is true that the new law was placed in an inappropriate section of law that passed in 1992 to establish the Certification and Training Program. The Certification &amp; Training Program is a two year program that trains permanent elections staff as authorized by RCW 29A.04.510 – RCW 29A.04.590.</p>
<p><b><u>Uniform Standards.</u></b>  HAVA provides, “Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.” 42 USC 15481(a)(6). There must be uniform statewide procedures and the Secretary of State should issue those procedures.</p>	<p>The State has developed standards governing the interpretation of ballots in WAC 434-261-070, WAC 434-261-075, and WAC 434-261-100. These WAC’s were developed in response to the 2000 Presidential election in Florida and HAVA.</p>
<p><b><u>The Role of Political Party Observers.</u></b>  The OSOS has not defined the role of observers or defined required training.</p>	<p>State statutes and WAC’s are replete with descriptions and requirements for political party observers and poll workers. See WAC 434-250-100, WAC 434-250-110, WAC 434-253-090, WAC 434-253-200, WAC 434-253-210, WAC 434-261-020, WAC 434-261-030, WAC 434-333-070, WAC 434-333-090, WAC 434-333-110, RCW 29A.12.130, RCW 29A.40.100, RCW 29A.44.050, RCW 29A.44.240, RCW 29A.44.410, RCW 29A.46.250, RCW 29A.48.060, RCW 29A.60.110, RCW 29A.60.170.</p>

<p><b><u>Training for Political Party Observers.</u></b>  The Secretary of State is required by RCW 29A.04.530 to “Establish and operate, or provide by contract, ... training programs for political party observers which conform to the rules for such programs established under RCW 29A.04.630”. This responsibility cannot be abdicated because it is difficult.</p>	<p>The OSOS does offer training for political party observers every year. See WAC 434-260-330. The OSOS also assists state and county political parties to conduct their own additional training. The training of political party observers that is required by RCW 29A.12.120 is performed by County Auditors, as that statute specifies.</p>
<p><b><u>Late Requests for an Absentee Ballot.</u></b>  RCW 29A.40.061 provides that an absentee ballot may be issued “if the information contained in a request for an absentee ballot or ongoing absentee status received by the county auditor is complete and correct and the applicant is qualified to vote under federal or state law”. Otherwise, the statute requires the auditor to notify the applicant why the application cannot be accepted.</p> <p>The OSOS believes the statute should have allowed the auditor to accept the request anyway if there is not enough time to notify the voter that the application is faulty.</p>	<p>RCW 29A.40.061 requires the County Auditor to notify the absentee voter if there is a problem with the request for an absentee ballot. The purpose of this requirement is to facilitate the issuance of the absentee ballot. Otherwise, the statute would require the County Auditor to ignore any request that does not conform exactly to all RCW and WAC requirements.</p> <p>WAC 434-250-030(5) provides a remedy if insufficient time exists to notify the voter: “If, in the judgment of the county auditor, insufficient time exists to correct the application, the auditor must issue the absentee ballot as if the voter had listed the county auditor’s office as his or her residence. Upon its return, the ballot must be referred to the county canvassing board, and the only offices or issues that may be tabulated are those common to the entire county and those for which it can be conclusively determined the voter is qualified to vote.”</p> <p>The WAC does not amend the statute. The WAC fulfills the statute’s intent of facilitating the issuance of the absentee ballot.</p>
<p><b><u>Unused Poll Ballots.</u></b>  RCW 29A.44.270 requires that all unused ballots be rendered unusable. WAC 434-253-170 is in direct conflict with the statute by limiting the requirement to “unwrapped” ballots.</p>	<p>Unused ballots that are still in the sealed package when the polls close do not need to be “rendered unusable”. The fact that they are in sealed packages renders them unusable. The number of unused ballots is accounted for on the ballot accountability forms required by WAC 434-253-160 and WAC 434-253-165.</p>

<p><b><u>Hospital Absentees.</u></b> RCW 29A.40.080 allows a resident of a health care facility to apply for an absentee ballot by messenger and have the messenger pick up the ballot.</p> <p>The OSOS provides in WAC 434-250-030 that the messenger can also return the cast ballot to the county auditor's office. This goes well beyond the statute and is a gross violation of ballot security.</p>	<p>RCW 29A.40.080 addresses the issuance of absentee ballots, not the return of absentee ballots.</p> <p>No statute restricts the return of absentee ballots – such a restriction would impair, rather than facilitate, the voting process. <u>All</u> absentee ballots may be returned in a variety of methods: delivered by the U.S. postal service, dropped off at the County Auditor's Office, dropped off at a polling place, dropped off at an Auditor-designated drop site, etc. No statute restricts who may deliver the ballot.</p>
<p><b><u>Issuance of Provisional Ballots.</u></b> RCW 29A.04.008 specifies that a provisional ballot is one issued for "any reason authorized by the help America vote act". HAVA authorizes two reasons: the name of the individual does not appear on the official list of eligible voters for the polling place, or an election official asserts that the individual is not eligible to vote. See 42 USC 15482(a).</p> <p>WAC 434-253-047 was amended to require that the disposition of provisional ballots voted for reasons not covered by that section or state statute must be determined by the county canvassing board. This gives the canvassing board extra-legal authority to arbitrarily accept provisional ballots cast for reasons not covered by HAVA.</p>	<p>The comment implies that provisional ballots may only be issued for reasons allowed in federal law, and ignores the reasons allowed in state law. EFF omits most of RCW 29A.04.008(5):</p> <p>"'Provisional ballot' means a ballot issued at the polling place on election day by the precinct election board to a voter who would otherwise be denied an opportunity to vote a regular ballot, for any reason authorized by the Help America Vote Act, including but not limited to the following:</p> <ul style="list-style-type: none"> <li>(a) The voter's name does not appear in the poll book;</li> <li>(b) There is an indication in the poll book that the voter has requested an absentee ballot, but the voter wishes to vote at the polling place;</li> <li>(c) There is a question on the part of the voter concerning the issues or candidates on which the voter is qualified to vote;</li> <li>(d) Any other reason allowed by law." <p>State law does not restrict the use of provisional ballots to the reasons provided in HAVA. The WAC is consistent with RCW 29A.04.008.</p> </li></ul>
<p><b><u>ID at the Polls.</u></b> WAC 434-253-055 misinterprets the ID requirement. The statute requires that "valid" photo ID be used for identification and implies that this means government issued ID.</p>	<p>RCW 29A.44.205 neither requires nor implies that photo ID be government issued. RCW 29A.44.205 specifically authorizes the OSOS to promulgate a rule to implement the statute. The WAC neither restricts nor expands the valid forms of ID allowed.</p>
<p><b><u>Special Ballots.</u></b> RCW 29A.40.050 prohibits filing an application for a special absentee ballot earlier than 90 days</p>	<p>The WAC provides the County Auditor with discretion to facilitate, rather than impair, the opportunity to vote. The purpose of special ballots is</p>

<p>before the election. The OSOS apparently feels that this requirement is unreasonable so in WAC 434-250-030 they permit an auditor to hold an earlier application until the filing period is open so that the auditor may “effectuate the voter's desire to vote”. This clearly subverts the statute.</p>	<p>to facilitate voting under unusual circumstances. Special ballots are most often utilized by members of the military who are about to be deployed. The WAC does not “subvert” the statute. This language has been in place since 1988.</p>
<p><b><u>Candidates listed on a Special Ballot.</u></b> WAC 434-250-040 allows the county auditor to list persons “who have indicated their intention to file for office” without any definition of what constitutes an “indication of intention” to file. Besides being an unauthorized amendment to the statute, this could mislead voters into voting for unqualified people and permits the auditor to arbitrarily choose who will be listed and who will not be listed.</p>	<p>Special ballots may be issued 90 days before the election. However, filing week occurs approximately 60 days before the Primary. Because a special ballot could be issued before filing week occurs, the County Auditor must be allowed to list any candidates who have indicated their intention to file for office. Otherwise, the special ballot would be completely blank and rendered meaningless. Among other sources, County Auditors routinely use public disclosure reports filed with the PDC and the FEC to learn which candidates have initiated a campaign.</p>
<p><b><u>Absentee Ballot Oath.</u></b> WAC 434-250-050 requires all absentee voters to swear that they have not already voted in the election.</p> <p>There should be one exception to this. The Federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) allows an absent service voter or an overseas voter to submit a Federal write-in absentee ballot but later override that ballot with a state absentee ballot. However, the OSOS will not allow that exception because they apparently misunderstand the Federal requirement.</p>	<p>The oath listed in WAC 434-250-050 is required by RCW 29A.40.091.</p> <p>RCW 29A.40.050(4) states, “A voter who requests a special absentee ballot under this section may also request an absentee ballot under RCW 29A.40.020(4). If the regular absentee ballot is properly voted and returned, the special absentee ballot is void, and the county auditor shall reject it in whole when special absentee ballots are canvassed.”</p> <p>Federal write-in ballots are treated similarly to special ballots. Federal write-in ballots are set aside by the County Auditor until all regular absentee ballots have been received. If no regular absentee ballot is returned from that voter, the federal write-in ballot is counted. If the absentee ballot is received, the absentee is counted.</p>
<p><b><u>Envelopes for Uniformed and Overseas Voters.</u></b> RCW 29A.40.150 requires the secretary of state to “produce and furnish envelopes and instructions for out-of-state voters, overseas voters, and service voters to the county auditors”. The OSOS believes</p>	<p>Congress enacted UOCAVA in 1986. The federal law applies only to members of the military, their family members, and overseas citizens. UOCAVA envelopes are paid by the Federal Voting Assistance Program, a division of the Department of Defense.</p>

that the statute is in error so they arbitrarily redefine what an out-of-state voter is in WAC 434-250-060.	The purpose of RCW 29A.40.150 is to implement UOCAVA in Washington State. The state does not have the authority to expand this federal program to <u>all</u> out-of-state voters. Consequently, the use of UOCAVA envelopes has been limited by WAC to those out-of-state voters who are military dependents.
<p><b><u>Campaign in the Polling Place.</u></b></p> <p>WAC 434-253-010 was amended to include get-out-the-vote campaigns in a list of prohibited polling place activities. This amendment lacks authority and is in conflict with the statute.</p>	WAC 434-253-010 prohibits get-out-the-vote campaigns from occurring <u>within</u> the polling place. This is a result of complaints during the 2004 general election that campaigners used cell phones within the polling place to call voters who had not yet voted. This was disruptive to voters and election workers. This WAC is consistent with RCW 29A.84.510, which prohibits activities in and around the polling place.
<p><b><u>Crediting.</u></b></p> <p>WAC 434-262-013 prohibits crediting a voter if the ballot was not counted. This is in direct conflict with the statute and could lead to the incorrect number of votes being used to calculate the percentage voting requirements for tax levies.</p>	The 2005 Legislature expressed a desire to ensure that the number of voters credited with voting equals the number of ballots counted. This number will never match if voters who return invalid and therefore uncounted ballots are credited with voting. The WAC is consistent with the new policy in RCW 29A.60.235 of reconciling the number of voters credited with the number of ballots counted.
<p><b><u>Accepting Ballots.</u></b></p> <p>Article VI, Section 6 of the constitution requires that all elections be conducted by ballot. RCW 29A.04.008(1) is the statutory definition of "ballot". In the context of the constitution and this proposed rule it is the "physical document on which the voter's choices are to be recorded".</p>	<p>EFF omits most of the statute.</p> <p>RCW 29A.04.008(1) states, "'Ballot' means, as the context implies, either:</p> <ul style="list-style-type: none"> <li>(a) The issues and offices to be voted upon in a jurisdiction or portion of a jurisdiction at a particular primary, general election, or special election;</li> <li>(b) A facsimile of the contents of a particular ballot whether printed on a paper ballot or ballot card or as part of a voting machine or voting device;</li> <li>(c) A physical or electronic record of the choices of an individual voter in a particular primary, general election, or special election; or</li> <li>(d) The physical document on which the voter's choices are to be recorded".</li> </ul>



<p>WAC 434-261-075 allows a voter to use anything for a ballot. This is without authority and conflicts with the constitution, the code, and common sense.</p>	<p>WAC 434-261-075(1) does not conflict with statute or the State Constitution, but instead establishes clear requirements for accepting votes on something other than the ballot issued:</p> <p>“If the voter returns voting responses by mail on any form other than the ballot sent, the votes thereon shall be acceptable and tallied provided that:</p> <ul style="list-style-type: none"> <li>(a) Only votes for offices or measures for which the voter is eligible are counted.</li> <li>(b) The candidate or measure response position for which the voter is voting can be clearly identified.</li> <li>(c) The ballot issued is not returned, or if returned, contains no marks or punches indicating an attempt to vote it.</li> <li>(d) A valid signature on an absentee oath is on file with the county auditor.</li> </ul> <p>The votes accepted must then be duplicated to a ballot that can be read by the electronic voting equipment.”</p>
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